PATHFINDER M & E SDN. BHD.

v.

CHEW KAR CHIN

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C23-2338-86]
6 JULY 1988

CIVIL PROCEDURE: *Appeal against summary judgment - Whether triable issues involved - Contract of guarantee and indemnity - Whether guarantor liable - Whether contract enforceable.*

This was an appeal by both plaintiff and defendant against an order made by the Senior Assistant Registrar in an O. 14 application. Defendant is the managing director of a company which had subcontracted certain works to the plaintiff on 15 Jan 1985. No payments were received by the plaintiff even though works were completed up to 20 May 1985 and despite 4 claims made. In order to prevent the plaintiff suing the company, the defendant personally executed a continuous and irrevocable guarantee, he being the guarantor. However, the cheque paid subsequently was dishonoured. Plaintiff took action against the company (CS 23-2305-86) and two days after that, instituted this action against the defendant. In the O. 14 application, the SAR ordered summary judgment against the defendant of part the claim amounting to RM100,000, interest at 8% per annum from date of judgment to date of realisation and costs but allowed defendant leave to defend as regards the balance sum claimed amounting to RM253,423.52 together with interest calculated at 1% per month and a retention sum of RM55,044.34.

Held:
Various issues were raised and disputed facts exists in the matter. The order of the Senior Assistant Registrar in giving judgment to the plaintiff is set aside by allowing the defendant's appeal with costs. Leave to defend as to the balance of the claims confirmed by dismissing the plaintiff's appeal with costs.

Legislation referred to:
Contracts Act 1950, s. 97

For the plaintiff - K.L. Wong; M/s. Wong & Co.
For the defendant - Mah Weng Kwai; M/s. Mah Weng Kwai & Associates

JUDGMENT

Siti Norma Yaakob J:

In this suit, the defendant is sued as a guarantor pursuant to a continuous and irrevocable guarantee and indemnity dated 18 April 1986.

On 15 October 1987, pursuant to an O. 14 application, the Senior Assistant Registrar ordered summary judgment against the defendant for part of the claim amounting to RM100,000, interest at 8% per annum from the date of judgment to date of realisation and costs but allowed the defendant leave to defend as regards the balance sum claimed amounting to RM253,423.52 together with interests calculated at 1% per month and a retention sum of RM55,044.34.

Dissatisfied with this decision, both the plaintiff and defendant appealed to me.

To appreciate the true nature of the plaintiff's claim, I need to relate the events that occurred in chronological order.

On 15 January 1985, a company called Pembinaan Taib Chew Sdn. Bhd. (debtor company) in which the defendant is its managing director, subcontracted the work of supplying and installing the air-conditioning system of an office and factory complex, to the plaintiff. Payments for such work were to be made progressively with the plaintiff submitting their claims to the debtor company for approval and they were to be settled within 14 days after clearance of the owner's cheques received by the debtor company who was the main contractor of the project.

Up to 20 May 1985 when the works were already completed, the plaintiff did not received any payment to any of the 4 claims they had submitted to the debtor company and the reason appears to be that the debtor company had no funds of its own to settle the progress payments as it was not being paid by the owners of the project. However, when pressed for payment, the debtor company issued a cheque dated 20 December 1985 to the plaintiff for RM250,000 but it was dishonoured when presented for payment.

The plaintiff must have threatened to sue the debtor company but in consideration of it withholding from doing so, the defendant as the managing director of the debtor company, personally guaranteed upon demand, the punctual payment by the debtor company of all sums due under the sub-contract not exceeding RM353,423 together with interest at 1% per month amounting to RM31,910.85 and a retention fund of RM55,044.34. The continuous and irrevocable guarantee and indemnity that was drawn up by a solicitor, Mr. Low Hop Bing, was executed by the defendant before him on 18 April 1986.

Following this, a cheque dated 30 July 1986 for RM20,000 was issued by the debtor company as purported payment towards the amounts due but this cheque was also dishonoured when presented for payment.

Then on 6 August 1986, the plaintiff filed CS 23-2305-86 against the debtor company for the sums due on the sub-contract dated 15 January 1985 followed 2 days later by the filing of this instant suit against the defendant personally for the same amounts due under the guarantee dated 18 April 1986.

The first issue taken by the defendant was the consideration given for the guarantee. In the instant case, the consideration given by the plaintiff for the guarantee is to withhold suing the debtor company for all sums as stated in the guarantee being the amounts due under the sub-contract signed by the plaintiff with the debtor company. The fact that the plaintiff had filed a suit against the debtor company two days before filing this instant suit, clearly shows that the consideration for the guarantee has failed totally and the guarantee is therefore unenforceable.

Quite apart from the consideration, the defendant also questioned the absence of a default clause in the guarantee, the effect of which renders the guarantee ambiguous and as such invalidates the guarantee.

The validity or otherwise of a guarantee depends on the construction to be put to it and when construing it, regard must be had to its reasonableness as well as the surrounding circumstances leading to its execution.

In Clause 1, the defendant guarantees, upon demand by the plaintiff, the punctual payment by the debtor company of all instalment payments contained in a schedule attached to the guarantee and which represents the total sums due and owing by the debtor company to

the plaintiff. From this it naturally follows that in the event the debtor company does not keep up with the instalment payments on the due dates, the defendant then becomes personally liable to the plaintiff to make such instalment payments. That must have been the main intention of the parties since the consideration given is the forbearance to sue the debtor company for the sums due.

Reading Clause 1 in its entirely, I had concluded that the default clause that the defendant maintains is missing is to be found in the following words that appears in the last 4 lines of p. 1 of the guarantee.

> ... and I undertake to indemnify and keep indemnified you and your successors-in-title and assigns against all losses, expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by you in consequence of any failure by the Debtor/s to perform any of the Debtor's obligations under the Legal Proceedings.

The validity of the guarantee was also questioned under s. 97 of the Contracts Act 1950 in that a co-surety did not execute a second guarantee. There is conflicting affidavit evidence on this as the defendant alleges that the guarantee would only be acted upon after the only other director of the debtor company, one Mohamed Taib bin Dato Mahmood, had also given his personal guarantee as a co-surety with the defendant.

Mohd. Taib bin Dato Mahmood has also affirmed that he was approached by the plaintiff to give his personal guarantee for payment of the sums due under the sub-contract and he was agreeable provided that all remedial works required to be done on the project would be attended to by the plaintiff. When that was not done, he declined go give his personal guarantee.

Mr. Low Hop Bing, the solicitor who prepared the guarantee signed by the defendant also affirmed that he was not aware that a second guarantee was to be executed as no instructions to that effect had been given to him.

At the material time, the debtor company had only 2 directors, the defendant as the managing-director and Mohd. Taib. With only 2 directors on its board, it is quite normal to expect both directors to give their personal guarantees of their company's debts particularly where the sums involved are substantial. It would not, therefore, be anything out of the ordinary to expect Mohd. Taib to give a second guarantee to the plaintiff. The fact that he had resigned in May 1986 is immaterial as the defendant executed his guarantee in April 1986 and if there was to be a second guarantee, it would be reasonable to expect that the second guarantee would also have been executed at about the same time as the defendant's guarantee. So also is the fact that Mr. Low Hop Bing was not aware that a second guarantee was required as this does not mean that such a guarantee had been anticipated by the parties.

Then there is the amount that is claimed against the defendant. Since the guarantee is to ensure payment of the sums due to the plaintiff under the sub-contract, the plaintiff's claim must be limited to the amounts actually due under the sub-contract dated 15 January 1985. However, the amounts as stated in the guarantee and being claimed by the plaintiff also include a sum of RM31,910.15 being interest calculated at 1% per month. The sub-contract does not provide payment of any interest other than the contract price, the performance bond and 5% retention fee. Clearly from the affidavits there is a dispute over the interest charged by the plaintiff.

Lastly there is the issue as to whether there was actual demand made to the defendant to settle the amounts that are being claimed by the plaintiff.

It is not disputed that the only letter of demand sent was the one dated 25 June 1986, wherein the plaintiff demanded payment for RM100,000 when the debtor company failed to meet payments on the first two instalment payments on the due dates. It was based on this letter of demand that the Senior Assistant Registrar had ordered judgment on the RM100,000 but by doing so he had proceeded on the basis that the guarantee was valid and enforceable.

I also need to mention here that the plaintiff relied on a dishonoured cheque dated 10 November 1986 for RM30,000 which had been paid in purported settlement of the sums due, as evidence of the defendant's admission and liability under the guarantee. This would be so if the cheque was the defendant's own cheque. A perusal of the cheque which has been exhibited, clearly shows that it was signed by the defendant in this capacity as the director of the debtor company and as such, the cheque belongs to the debtor company.

Since various issues had been raised particularly as to whether the guarantee is valid on the ground that the consideration for it had failed totally, and there also disputed facts, I accordingly set aside the order of the Senior Assistant Registrar giving judgment to the plaintiff for RM100,000 by allowing the defendant's appeal with costs and confirmed the Senior Assistant Registrar's order giving leave to the defendant to defend as to the balance of the claims by dismissing the plaintiff's appeal with costs.

Also found at [1988] 2 CLJ 476